No. 2894

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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UNITED STATES OF AMERICA,

Appellant,

vs.

GRAND CANYON CATTLE COMPANY, a Corporation.

On Appeal From the United States District Court for the District of Arizona.

REPLY BRIEF FOR THE UNITED STATES

SWEENEY, VARNEY & STRAUB, PRINTERS, PORTLAND

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This is a simple case arising out of the fraudulent acquisition of non-mineral public lands under the mining laws and the subsequent sale of the lands to one who claims to be a bona fide purchaser. The District

Court held that the Government failed to show that the purchaser had received notice of the fraud committed by the patentee, and accordingly entered a decree dismissing the bill.

In view of the long established ruling so recently reaffirmed by the Supreme Court in Wright-Blodgett Company v. United States (236 U. S. 397), that the defense of bona fide purchaser is an affirmative defense which must be set up and established, the decree of the District Court was clearly erroneous and our original brief was practically limited to a discussion of that proposition.

Appellee's brief so misrepresents the Government's attitude and so distorts its theory of the case that we cannot permit it to remain unanswered and that constitutes our excuse for inflicting upon the Court this reply brief.

The plaintiff offered abundant evidence showing that the lands involved are not mineral; that no discovery of mineral was ever made thereon, and that they were acquired by the patentee, B. F. Saunders, solely becausee they contained water holes and springs; and that evidence was not contradicted. The defendant made no attempt to refute the showing in this regard —presumably because it would have been useless to do so. This being the situation, and the District Court having announced that if the case were one solely be-

tween Saunders and the Government, the latter would be entitled to a decree, we regarded it altogether unnecessary to consider that feature of the case and, as stated, confined our original brief to the question of law arising from the defendant's claim of innocent purchaser.

In the opening of their argument, counsel concede that our position on this question is sustained by the weight of authority, but they suggest that the rule is not universal, and then proceed during the course of their brief to so adroitly shift their position from time to time that they finally reach a point where the burden of proving notice is shifted upon the Government.

APPELLEE'S FIRST CONTENTION.

First, counsel contend that it is now too late to raise any question of defective pleading and that when evidence was offered tending to prove facts that had not been properly alleged, objection should have been made at the trial. This may well be granted, because, as we contend, not only was the defense not properly set up in the answer, but there was also an absence of evidence to establish it. It is particularly pointed out in our original brief (page 7) that the lack of a statement of the consideration is not in any manner supplied by the evidence, which in this respect is not a whit more definite than the bare allegation of the answer that a valuable consideration was paid for the land.

The truth is, at the trial of this case not only defendant's counsel and the Court, but apparently plaintiff's counsel also, proceeded upon the theory that upon the Government rested the burden of showing that the Cattle Company had notice of the patentee's fraud. This is clearly shown by the fact that a general demurrer to the original bill was sustained (R. 17, 18), upon which the bill was amended so as to charge notice more particularly (R. 19-32).

But the rights of the Government cannot be lost through the failure of its counsel and the trial court to properly understand the law. The allegation of the bill charging the Cattle Company with notice of the fraud by which Saunders acquired the patents was mere surplusage, and the plaintiff was not required to prove it. United States v. Brannan (217 Fed. 849).

APPELLEE'S SECOND CONTENTION.

Counsel next contend that the record shows conclusively that the defendant was an innocent purchsaer; and in this connection complains that our brief calls the Court's attention to no evidence whatever, except that of Mr. E. J. Marshall. As Mr. Marshall was the only witness called by the defendant and it was upon his evidence alone that the defendant relied to establish its defense, we are unable to see any cause for complain-

ing that we confined ourselves to a discussion of his testimony.

At this point in their brief counsel take the ground that when a defendant, relying upon the defense of innocent purchaser, proves the payment of a valuable consideration, the burden of showing notice then shifts to him who alleges the fraud. Several cases are cited to support this proposition, two federal and a number of state cases. The latter we have not had an opportunity to examine, nor are we greatly concerned with their pertinency, in view of the rule so clearly announced by the Supreme Court, and which necessarily controls all federal courts.

The federal cases cited in this connection are Jones v. Simpson (116 U. S. 614), and United States v. Cowart (205 Fed. 316). The first of these cases arose under the Kansas statute for the prevention of frauds and perjury; and the personal property involved in that case had been delivered and the vendee proved the payment of a sufficient consideration. The Supreme Court held that in that state of the case and under the language of the statute, the burden of proving that the sale of the goods had been made with the intention to defraud creditors was upon him who alleged the fraud.

It is true that in the Cowart case the bill was dismissed upon the ground that the Government had failed to prove notice on Brannan, one of the defendant pur-

chasers, who in his sworn answer had denied knowledge of the fraud. But an important fact, which seems to have been overlooked by counsel, is that on the Government's appeal, this case was reversed by the Court of Appeals for the Fifth Circuit, in a decision which strongly supports our contention in this case. See U. S. v. Brannan (217 Fed. 849).

We cannot concede, therefore, that the burden of proof shifts at any stage of the proceeding and do not believe that a case can be found where the Government in an effort to secure cancellation of land patents procured by fraud was required to prove notice, merely because it was made to appear that the transferee had paid a valuable consideration for the land. While the record in the Wright-Blodgett cases is not before us, our recollection is that it shows that a valuable consideration, if not a fairly adequate one, was paid in each instance, notwithstanding which the court held the burden was upon the defendant to establish its purchase without notice.

APPELLEE'S THIRD CONTENTION.

Having thus satisfied themselves that upon its appearing that a valuable consideration was paid, the burden of proof is shifted, counsel claim that the record shows the payment of a valuable consideration for the

lands in this case and in support of this refer to the large sums paid for the entire ranch, including horses and cattle. It is said that the purchase price aggregated more than $212,000, of which the sum of $50,000 was paid for the lands.

This is inaccurate. According to Mr. Marshall, $50,000 covered everything on the ranch, except the livestock. In this connection we cannot do better than to repeat the quotation from his testimony, where he said that the plant consisted of:

> all the lands owned, scrip, lands, water appropriations, pipe-lines, troughs, corrals, buildings, wagons, supplies, harness, saddles, and everything that went to make up the equipment, and everything that in any way pertains to what is known as the V. T. ranch. That went in as the plant for the sum of fifty thousand dollars; that included all cabins, structures or houses that were located on owned property, or whatever Saunders' rights were to property on the Forest Reserve. In other words, my understanding was that it included any property that Mr. Saunders claimed through either legal or equitable right or through possession.

We therefore confidently reiterate that neither the answer nor the evidence shows what consideration, if any, was paid for the lands in controversy.

APPELLEE'S FINAL CONTENTION.

Counsel finally contend that a valuable consideration having been proved, the burden of showing notice

rested upon the Government and that this notice must be established by clear and convincing proof, reference being made to the Maxwell Land Grant case (121 U. S. 325) and other kindred cases.

This is but a begging of the question, because it assumes the truth of appellee's other contentions that a valuable consideration is shown to have been paid and that the burden of proof thereupon shifted to the Government. We do not consider it necessary, therefore, to discuss this proposition or to refer to the cases cited further than to say that the rule announced therein had reference to the character of proof required to establish the fraud by which the patents were alleged to have been secured. Moreover, this court is thoroughly familiar with the cases mentioned and no analysis by us is necessary to show how clearly distinguishable they are from the Wright-Blodgett cases and the case at bar.

Toward the conclusion of their brief, counsel characterize as "utterly flimsy" the claim of the Government that the record discloses facts sufficient to put Mr. Marshall upon inquiry; and they marvel that the Government of the United States should continue to prosecute this suit or that its counsel should have the temerity to assert before this court that the evidence shows that the respondent or Mr. Marshall was not acting in good faith in the purchase of this property.

In reply to this it is sufficient to say that nowhere

in our original brief is there an assertion that the record shows that either Mr. Marshall or his Cattle Company was not acting in good faith. In our theory of the case we are not required to show that; the burden was clearly upon the defendant to show affirmatively that it purchased without notice, and we contend that it did not do this. We referred to Mr. Marshall's testimony for the reason that he alone was offered to prove that the purchase had been made without the notice of Saunders' fraud, and in doing so mention was made of facts and circumstances which could not possibly have escaped his attention and which in our judgment were sufficient under the authorities to put him upon further inquiry, which, if followed up, would have inevitably disclosed the flagrant fraud that induced the issue of the patents.

What we neglected to do (because we considered it unnecessary) was to point out particularly the facts and circumstances tending to show actual notice of the fraudulent character of the mining claims, but in view of counsels' complaint, and at the risk of stretching the office of a reply brief, we shall do it now.

It should be said here that no distinction is attempted between Mr. Marshall and his Cattle Company, because none exists. In law they are one. In the memorandum agreement entered into between Saunders and Mr. Marshall on July 30th, 1907, it was expressly provided that the latter would organize or cause to be organized a corporation to be known as the Grand Canyon Cattle

Company, which would be authorized to acquire and hold the property in question (R. 438, 439). Notice to Mr. Marshall, therefore, was notice to the company. Linn & Lane Timber Company v. United States (236 U. S. 574.)

Government's witness, Chas. Dimick, was appointed ranch foreman for Saunders in 1901, and from that time until the ranch was sold to the Grand Canyon Cattle Company he remained foreman and assisted in or conducted the work looking to the development of water on the ranch (R. 39, 102, 103). Dimmick had an intimate knowledge of the entire situation, as he had taken part either in the location of each one of the so-called mining claims or in the proceedings to acquire title from the Government. In the case of the Sunset Lode and Mill Site he made the affidavits of expenditures (R. 344); in each of the other cases he made affidavits as to posting of notice for application of patents (R. 362, 370, 377). The testimony of this witness shows that practically all the so-called assessment done upon the several claims was done for the purpose of developing water (R. 60-69). Mr. Dimmick was in charge of the ranch when it was visited by Mr. Marshall and the latter's manager, H. S. Stevenson, in June and September, 1907 (R. 211, 323). Mr. Marshall admitted that Stevenson had been associated with him for fifteen years as manager of his cattle interests (R. 322).

Dimmick testified that it came to his attention in May or June, 1906, by way of a letter from Saunders, that a deal was on between him and Stevenson. The letter had been destroyed and the only thing recalled by Dimmick was that Saunders stated that he contemplated the sale of the whole property to Mr. Stevenson, and the next information Dimmick received in regard to the matter was in the summer of 1907, when Stevenson and Mr. Marshall visited the properties to look them over (R. 210, 211). On the occasion of that visit a number of the water holes on the ranch were inspected, including several of those found on the lands in controversy (R. 211). When asked as to whether he knew anything concerning the capacity in which Mr. Stevenson was acting, Dimmick replied that he was inspecting and looking over the property with the view of purchasing; that Stevenson said it was his business to look over the property and inspect it for that purpose (R. 228).

Mr. Stevenson not only visited the ranch in June and September of 1907, but he was there later in October, when the counting and branding of the cattle took place. On that occasion he was met by Seldon F. Harris, Forest Supervisor, who was making his fall inspection of the range (R. 260-263). Harris testified that in the course of a conversation with Mr. Stevenson, the latter was frankly informed that several of the claims, including the Jacobs Lode, were being held by the Gov-

ernment as invalid and that it was very doubtful in his (Harris') opinion whether patent on the same would ever be issued, because reports of all Forest Supervisors showed these claims to have been located to obtain water sources and not for mining purposes, and further that the claims did not contain mineral (R. 265, 266).

Defendant's counsel's objection to this testimony was sustained by the Court on the ground that it had not been established that Stevenson was agent for the Cattle Company; and the testimony was taken under rule 46. It may be that Stevenson was not the agent of the Cattle Company in the summer and fall of 1907, because the company was not organized until October of that year, but Stevenson was clearly acting for Marshall, and the Cattle Company depended for its very existence upon Marshall's carrying out the promise he had made Saunders.

Again, it should be observed that the sale of the property to the defendant Cattle Company was not consummated until December 5th, 1907. Indeed, all of the purchase price was not paid until June 10th, 1909 (R. 405). Mr. Marshall testified that after the deeds were executed December 5th, 1907, Dimmick was made foreman for the Cattle Company, just as he had formerly been for Saunders (R. 328). He admits, however, that the company paid the men employed beginning December 1st. He was inclined to believe that possibly a few of the men were paid for November, but he

testified positively that Dimmick received his first salary for the month of December and none before that (R. 329, 330). Dimmick's testimony in this regard is to the effect that on the occasion of Marshall's second visit to the ranch the latter stated that he would like Dimmick to remain on the property to handle it for a while in the same way he had been handling it for Saunders (R. 219); that his last payment as foreman for Saunders was about the last of October, 1907; that he received his first payment either from Mr. Marshall or Stevenson about the first of January, 1908, being compensated for a part of the month of November from the Grand Canyon Cattle Company. His recollection was that his services with the company commenced November 15th (R. 221).

It is true that Marshall testified that the only tracts in the controversy that he visited was Jacobs Lode; but it is stated in the agreement entered into with Saunders (supra) that he had "personally and through his agent examined" the properties to be purchased. Whether the agent thus referred to was Stevenson or Dimmick or someone else, does not appear, but Mr. Marshall is in any event chargeable with notice of what an inspection of the property would have shown. United States v. Krueger (228 Fed. 97). In the case cited the Court of Appeals for the Eighth Circuit held that the purchaser of the land from one who had acquired patent through the location of scrip was charged with the notice of possession by another; in other words, a man who

buys land will not be heard to say that he did not know what could have been learned by a fair inspection of it. (Winona and St. Peter Railroad Co. v. United States, 165 U. S. 483.)

Our review of the circumstances tending to show notice is not to be taken as an admission that there is an obligation on the Government to prove notice, because we do not recognize that any such obligation exists. But counsel have laid so much stress upon Mr. Marshall's bare denial of notice, claiming that in the face of it the Government should not continue to prosecute the case, that we have felt justified in inviting attention to certain admitted facts and circumstances which we would ask the Court to contrast with his unsupported denial.

Respectfully submitted,

S. W. WILLIAMS,

Special Assistant to the Attorney General.

October, 1917.